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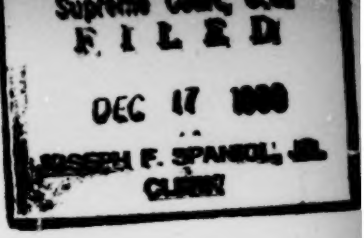

No. _____
October Term 1990

IN THE SUPREME COURT OF THE UNITED STATES

MOHAMED ABDORABEHE, et al,

Petitioners

v

STATE OF MICHIGAN,
DEPARTMENT OF COMMERCE,
DEPARTMENT OF ATTORNEY GENERAL,
SECRETARY OF STATE,
CORPORATIONS & SECURITIES BUREAU

Respondents

PETITION FOR WRIT OF CERTIORARI
TO COURT OF APPEALS OF MICHIGAN

Mitchell H. Nelson (P22825)
HERITAGE LAW CENTER, P.C.
Attorneys for Petitioners
731 Front, NW
Grand Rapids, MI 49504
(616) 774-0055

A. QUESTIONS PRESENTED FOR REVIEW

1. Can the State of Michigan Defendants violate Plaintiffs' Fifth and Fourteenth Amendment Constitutional Rights to Due Process of Law and Equal Protection of the Law by aiding and abetting a fraud scheme and avoid liability and a trial of the issue because they are not considered a person, under 42 USC 1983?

2. Did Judge Kallman, the Court of Claims Judge, commit reversible error by granting Summary Disposition to Defendants, dismissing Plaintiffs' violation of the Fifth and Fourteenth Amendments, Federal Constitutional Rights to Due Process of Law and Equal Protection of the Law, by simply holding that the state is not a person pursuant to 42 USC 1983?

3. Did the Michigan Court of Appeals commit reversible error by affirming the lower court's decision by way of a Motion to Affirm, disallowing Plaintiffs' Appeal or hearing in regard thereto?

4. Did the Michigan Supreme Court commit reversible error by summarily denying Plaintiffs' Application for Leave to Appeal without a hearing?

B. PARTIES TO THE PROCEEDING

MOHAMED ABDORABEHE & QUMZA MASEAD
ERIC W. ANDERSON & VICKI S. ANDERSON
LLOYD BACHI & MARY LOU BACHI
ROBERT BAIR & LINDA BAIR
HENRY BEAGLE & DOROTHY BEAGLE
KATHY BOOGARD
RICHARD BENNETT & JUDITH DOYLE
ELMER BOWERMAN
JOHN BROOKE & ALICE BROOKE
DANIEL M. BROWN & RUTH E. BROWN
MARTIN BUCKLER & ESTHER BUCKLER
BERNARD BULKOWSKI
FRED CAMPAGNA
JEANETTE CHILSON & PRUDENCE GAINES
WILMONT F. CLARK & ADA M. CLARK
LEWIS COLE
RANDY COMSTELLER
RALPH F. CONANT & VERNISE R. CONANT
RAYMOND DAME & BETTY DAME
PETER CROWE & BETTY L. CROWE
COLBURN EBY & GENEVA EBY
CLARENCE L. EWER & OPEL L. EWER
NORMAN FALETE & PATRICIA FALETE
ALLEN FENTON & ZENNAH M. FENTON
LLOYD FERINGA & BERNICE FERINGA
HENRY R. FITCH & MILDRED A. FITCH
ROBERT A. GAFFIELD & ERICK GAFFIELD
& CINDY GAFFIELD
WILLIAM GALLOP & JOSEPHINE GALLOP
HAROLD W. GARDNER & JEANNE E. GARDNER
& STEPHEN GARDNER
CARL HALE & BETTY HALE
GAYLORD B. HARIG & ALICE J. HARIG
DONALD M. HARRIGAN & MARJORIE HARRIGAN
CORNELIA M. HART
D.K. HASWELL & IRMA HASWELL
ARMOND J. HOULE

ANNA JANSEN
RUDOLPH KESTEL & ANN M. KESTEL
CARL F. KIACZ
THOMAS KILLEWALD & MARVEL KILLEWALD
BRYAN KOTSCH
ROBERT L. KOTSCH & JUDITH L. KOTSCH
ALVEN KRUMLAUF
FREDERICK E. MANIGOLD & GERLINE MANIGOLD
EDWARD J. MAZUREK & ANNA MAZUREK
NEIL McPHEE
DOLORES KESTEL MIKL
GREGORY MIKL & BONNIE MIKL
CLARENCE H. MULDER & MARIE MULDER
WILLIAM J. MURRAY & MARY D. MURRAY
NANCY B. MUSKO
AGATHA C. NOA
ARLIE O'NEAL
CHARLES R. ORR & ETHELEEN ORR
FRANK PFLUM & MYRTLE PFLUM
LORE PAUTZ
WAINO PIHL & MARY PIHL
JACK L. RICHMOND & ROSE B. RICHMOND
ELMA RUTHARDT
JOHN R. RYSDYK & GRACE A. RYSDYK
CHESTER SEEL & BERNICE SEEL
SMITH J. SHERMAN & KATHLEEN SHERMAN
FRANK SHUMP
RITA SIZEMORE
CLAYTON W. SMITH & JAMES W. SMITH
ARTHUR SPROUL
KEITH E. STANTON & JUDITH J. STANTON
THADDEUS TANNER & IRENE TANNER
WAYNE TESSMAN
LAURETTE VINCENT
ALBERT WALTER & THERESA WALTER
JOHN WIERINGA & GERTRUDE WIERINGA
DOYLE A. WILLSON & ESTHER WILLSON
ANTONI ZIARNOWSKI & FRANCISZKA BUJAK
EDWARD ZINY
MARIE ZOBERSKI

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D. OPINIONS OF THE LOWER COURTS

(1) Judge Kallman's Opinion in the Court of Claims dated August 17, 1989, granting Defendants' Motion for Summary Disposition and the transcript of his Opinion in the Abshire case referred to in that Order.

(2) The Michigan Court of Appeals' Order, without Opinion, dated December 5, 1989, denying Plaintiffs-Appellants' Appeal, and granting Defendants' Motion to Affirm.

(3) Michigan Supreme Court's Order, without Opinion, dated September 19, 1990, denying Plaintiffs-Appellants' Application for Leave to Appeal, without hearing.

E. CONCISE STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(1) Denial of Due Process of Law, guaranteed to Plaintiffs by the Fifth and Fourteenth Amendments, protecting these rights against

State interference by way of aiding and abetting the Diamond/Obie fraud scheme.

(2) Denial of Equal Protection of the Law, guaranteed to Plaintiffs by the Fourteenth Amendment, protecting these rights against State interference by the State of Michigan in aiding and abetting the Diamond/Obie fraud scheme.

(3) Plaintiffs' Complaint alleging violation of their Constitutional Rights to Due Process and Equal Protection has been summarily dismissed by all of the Michigan Lower Court System, without the benefit of a hearing and, with the exception of the Court of Claims, without the benefit of an Opinion to support same.

(4) The Lower State of Michigan Courts have decided the question in such a way that it is not in accord with the applicable decisions of the Supreme Court, requiring Due Process of the Law and Equal Protection of the Law.

(5) The original Order Granting Defendant's Motion for Summary Disposition was

entered by Judge Kallman in the Court of Claims on the date of August 17, 1989.

(6) Plaintiffs-Appellants' Appeal was summarily denied without a hearing and without any written opinion or justification for denying same by the Michigan Court of Appeals, denying Plaintiffs-Appellants' rights by granting Defendants' Motion to Affirm without a hearing, said Order dated December 5, 1989.

(7) The statutory provision providing for review by this Court by way of Writ of Certiorari is provided for in 28 USC 2101.

F. CONSTITUTIONAL PROVISIONS VIOLATED BY DEFENDANTS.

(a) Fifth Amendment

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be

compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(b) Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immmunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NOW COME Plaintiffs by their attorney, Mitchell H. Nelson, and hereby Petition the United States Supreme Court for a Writ of Certiorari. This Petition for a Writ of Certiorari is to review the Opinions and Orders of the Michigan Court of Claims, the Michigan Court of Appeals and the Michigan Supreme Court, granting Summary Disposition to Defendants.

G. CONCISE STATEMENT OF CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED.

Plaintiffs, mostly retired, elderly citizens, lost their life savings ($9,000,000.00) in a fraud scheme perpetrated by the Diamond/Obie Companies. Diamond Mortgage would obtain mortgages and notes, signed by mortgagors, and then not pay the mortgagor the loan proceeds. Diamond would then assign the undisbursed mortgage and note to A.J. Obie & Associates for the alleged purpose of securing investments

in A.J. Obie by Plaintiffs/Investors. The scheme was an out-and-out Ponzi scheme, and the principal, Barton Greenburg, has pleaded guilty to the fraud. The fraud was aided and abetted by Celebrity Actors, George Hamilton and Lloyd Bridges, as well as lawyers and accountants. The fraud was also aided and abetted by the State of Michigan. Plaintiffs therefore instituted litigation against the State of Michigan in the Court of Claims on the date of April 4, 1989. The pleadings specifically alleged the aiding and abetting of the fraud by the State of Michigan, and in addition to pleading violation of the State of Michigan Due Process and Equal Protection Clause of its Constitution, alleged violation of the U.S. Constitutional Rights of Due Process of Law and Equal Protection of the Law, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

Although Plaintiffs' Complaint filed in the

Court of Claims clearly alleged the violation of United States Constitutional Rights of Due Process of Law and Equal Protection of the Law, the Court of original jurisdiction, namely, the Michigan Court of Claims, granted Defendants' Motion for Summary Disposition, based upon the pleadings by its Opinion dated August 17, 1989, holding that Defendants/State of Michigan were not persons pursuant to 42 USC 1983, summarily dismissing Plaintiffs' Federal Constitution Violation Counts on that theory.

Plaintiffs appealed Judge Kallman's erroneous Decision to the Michigan Court of Appeals, and the Court of Appeals granted Defendants' Motion to Affirm, without benefit of a hearing, by its Order dated December 5, 1989.

Discovery in companion litigation in fact established the aiding and abetting of the fraud by the State of Michigan, establishing the fact

that the State of Michigan knew Diamond/Obie was insolvent, knew Diamond/Obie was in violation of the Michigan and Federal Securities Law, and knew Diamond/Obie was in fact committing fraud in 1982. Nevertheless, Defendants condoned and encouraged the fraud by waiving the legal requirement that Diamond/Obie file an audited financial report and entering into a Consent Order specifically authorizing Diamond/Obie to operate under Color of State Law until they went bankrupt in August, 1986.

An Affidavit of Sharon H. Norris, one of Plaintiffs' attorneys, was filed in the Court of Appeals and attached to a Motion to Allow the Filing of the Supplemental Brief, and stated as follows:

> Sharon H. Norris, first being duly sworn, deposes and says:
>
> 1. That the Deposition of Ronald Rubach, Director of Enforcement for the Corporations & Securities

Bureau was conducted on the date of January 29, 1990, in regard to companion litigation pending in the United States District court, Western District of Michigan.

2. That the Deposition of Ronald Rubach disclosed the following:

(a) Mr. Rubach testified that Rule 451.603.4 and Rule 451.605.2 clearly required Diamond Mortgage to file an Audited Financial Report in regard to its Broker/Dealer License.

(b) That the Order of Registration in regard to Diamond Mortgage Corporation's application for a Broker/Dealer License ordered by law a certified audit to be filed with the Enforcement Division of the Securities Bureau not more than 90 days after the formal fiscal year ended.

(c) That although Diamond Mortgage Corporation was required by law to file certified financial audits, both as issuer of the securities and in support of its application for Broker/Dealer License, James Karpen, the then Director of Enforcement for the Securities Bureau waived the required Audit by a Memo dated December 2, 1981.

(d) That Diamond was unable to file an audited report and they

therefore would have been put out of business, and the vast majority of Plaintiffs would not have sustained their losses.

(e) That this apparent waiver of required audited financial reports was the only policy for the past 24 years.

3. That the Deposition of James L. Karpen, former Director of Enforcement for the Securities Bureau, was conducted on the date of February 8, 1990, in regard to companion litigation pending in the United States District Court, Western District of Michigan, and that the Deposition disclosed the following:

(a) Mr. Karpen testified that the Broker/Dealer Registration Law required the filing of Audited Financial Reports on behalf of Diamond.

(b) That either he, or the Director of Securities, Mr. Mackey, waived the requirement of filing Audited Financial Reports, although that had never been done in the past.

(c) That it was a violation of the Broker/Dealer Licensing Law for a Broker/Dealer to become insolvent and not notify the Bureau.

(d) That had he known Diamond was insolvent, he would have suspended

their operation.

(e) That he did receive an Unaudited Financial Report on behalf of Diamond prior to waiving the requirement of a Certified Financial Report, and that the Unaudited Report did in fact show Diamond was insolvent, did not have Seven Million Dollars in Mortgages as represented by Diamond and its attorneys, and did not have a net worth of One Million Dollars.

(f) That a letter sent to a Mr. Sullivan of the Better Business Bureau from Diamond's attorney, Peter Sugar, stated that Diamond had fully complied with a Consent Order entered by the Bureau, and that Diamond had an absolutely clean record and was in fact endorsed and sanctioned by Mr. Karpen by his silence, although those statements were just plain not true.

(g) That when he waived the requirement of the Audited Financial Report, he was aware of the fact that there was massive abuse of the Rules by Broker/Dealer, such as Diamond.

(h) That Mr. Karpen waived the requirement of Diamond to file a Certified Financial Audit, and then allowed Diamond to form a new Broker/Dealer Corporation, which also did not comply with the law.

4. The Deposition of Securities Bureau Investigator Gerald Sheppard was conducted on the date of February 13, 1990, in regard to companion litigation pending in the United States District Court, Western District of Michigan, and that his Deposition disclosed the following testimony:

(a) That Diamond was violating the Broker/Dealer law by double-assigning Mortgages.

(b) That the Broker/Dealer Law of the State of Michigan required Diamond to file a certified audit.

(c) That Diamond did file an Unaudited Financial Report, and that the Unaudited Financial Report established that Diamond was in fact insolvent, three million in the red, failing to escrow taxes and insurance payments, and did not have a net worth of a million dollars and seven hundred valid Mortgages as represented by Diamond and its attorneys.

(d) That he placed a Memorandum in the file, outlining the insolvency of Diamond, recommended that they be closed down, and that although the Broker/Dealer Rule requires a Audited Financial Report, and that there is no provision for waiver of same in the law, for some reason, his superior, Mr. Karpen, waived

that requirement, against the advice of himself and Ron Rubach.

(e) That although the Securities Bureau knew that Diamond was doubly assigning Morgages, and failing to assign Mortgages to investors, as promised, the Bureau allowed Diamond to stay in business, without filing the required Certified Audits, and realizing they were insolvent, all contrary to the recommendations of Mr. Rubach and Mr. Sheppard.

5. That in December, 1983, Mr. Karpen, the then Director of Enforcement for the Securities Bureau, closed his file on Diamond; although Diamond had still not filed Certified Audit as required by law, stating that Complaints had been eliminated in regard to Diamond, but in fact the Complaints had not been eliminated.

6. That the Diamond entities were in violation of Rule 704.1 and Section 101(2) of the Securities Act, in failing to update Offering Circulars.

7. That the Unaudited Financial Report established the fact that Diamond was not escrowing taxes and insurance payments as required by law.

8. That Mr. Sheppard was concerned about a Ponzi Scheme being sanctioned by the State of Michgian, in that

> it would take new money to pay off old debt.
>
> 9. That for some reason his Memoranda pertaining to investigation of Diamond Mortgage ended up in Barton Greenburg's files.
>
> /s/ Sharon H. Norris

A transcript of the original proceedings before Judge Kallman on the date of April 20, 1988 revealed the fact that the Federal question was in fact timely and properly raised, giving this Court jurisdiction. On page 4 and 5 of that transcript, Defendants' attorney raised the issue by stating:

> With respect to the plaintiffs' constitutional arguments, Your Honor, I have stated all these arguments in my brief, and I am just summarizing briefly.
>
> The plaintiffs' primary thrust is under 42 USC, Section 1983, and with respect to the state agencies, the state agencies are not a person as that term is contemplated under 1983.

And therefore the state agencies clearly ought to be dismissed.

Smith versus Department of Mental Health makes that clear.

The equal protections violations alleged in the plaintiffs' complaint simply do not state a claim under the Michigan Constitution or under the Federal Constitution. What we have here are groups of investors who are complaining about state action. The problem is that they are not members of any identifiable suspect class.

Plaintiffs' counsel stated his position on pages 9 thru 11 of that transcript, as follows:

We do not have any question in our mind, Your Honor, Cavanaugh, and those are the only two Justices, Your Honor, that hold the State is not a person or -- the State is not a person under the 1983.

The some and substance, Your Honor, is that the majority, namely -- Your Honor, I must correct an error. The dissent in the case concurring is written by Justice Boyle and then concurred in by Cavanaugh. The majority opinion what I stated earlier was only two justices so held, I meant Justice Ripley and Justice rather, because the

majority opinion was written by Birkley and concurred in by Ryder. These were the only two justices, Your Honor, that held that the State is not a person under 1983.

The majority of the Justices threw out that distinction and contend, Your Honor, the holding of Smith, Your Honor, is that the State is a person under 1983, and I contend because of the holding of the Justices Boyle and Cavanaugh, Levin and Archer which is four, against two, Your Honor, and -- if the Court will read that decision and perhaps -- perhaps he already has -- it is clear, Your Honor, that Justices Boyle, Cavanaugh and Levin and Archer -Boyle and Cavanaugh -- hold that the State is a person, and Archer and Levin throughout that whole bag, and say it does not make any difference because of the fact that if there are constitutional violations made by the State, obviously there is a remedy and obviously, it can be litigated in Court now.

Now, on pages 639 of the Concurring Opinion by Justice Boyle and Cavanauh, and then also, Justice Levin and Archer's opinion, four Justices go out to say how absurd it would be, Your Honor, to say that the State of Michigan can violate the constitutional rights of people, and

> there to tell those people they have no -- in short, Your Honor, four justices do say that we have a case if, in fact, the constitutional rights of my client have been violated, and the four justices, Your Honor, do say that there is a remedy if, in fact, the rights have been violated, and so we contend, Your Honor, that on the Smith Case, that we do have a case against the State of Michigan for violation of the constitutional rights, namely due process, and equal protection under the law, and we do say that the remedy is provided to us, and we do say that pursuant to the majority, before justices, that the defense motion for summary disposition should necessarily be denied.

The Court, through Judge Kallman, made its ruling on page 19 of that transcript by holding that:

> So, I will rule that under 1983, the State is not a person for purposes of being sued under the Constitutional Provisions of due process and equal protection.

Plaintiffs' rights to litigate the violation of their due process and equal protection guarantees were therefore eliminated by Judge

Kallman on the simple holding that the State is not a person under 42 USC 1983.

Plaintiffs appealed Judge Kallman's erroneous decision to the Michigan Court of Appeals, and the Court of Appeals granted Defendants' Motion to Affirm without benefit of a hearing by its Order dated December 5, 1989. Plaintiffs then appealed to the Michigan Supreme Court, requesting leave to appeal, and the Michigan Supreme Court denied Plaintiffs-Appellants' Application for Leave to Appeal, without opinion, and without hearing, by its Order dated September 19, 1990.

The original Brief in Opposition to Motion for Summary Disposition and the Appellate Briefs filed in the Court of Appeals and the Michigan Supreme Court all discuss the federal question presented and saliently point out that it is patently ridiculous and illogical to hold that Plaintiffs have rights under the Fifth and Fourteenth

Amendments to the United States Constitution and Due Process of Law and Equal Protection of the Law, but that there is no remedy because the state is not a person under 42 USC 1983. This result was certainly not the intent of the framers of the Constitution and the Fifth and Fourteenth Amendments, in that those rights guaranteed would be ineffective and useless without the ability to enforce same.

The law in regard to the questions presented before the Supreme Court was outlined by Plaintiffs in the companion case of Abshire v State of Michigan, Docket No. 89294 in the Michigan Supreme Court. That Brief on file states as follows:

> D. ISSUES
> 1. ARE PLAINTIFFS ENTITLED TO HAVE THEIR ALLEGED FEDERAL VIOLATION OF CIVIL RIGHTS LITIGATED, OR ARE THEY JUST PLAIN WITHOUT A FORUM?
>
> The corrollary issue -does the Eleventh Amendment preclude and authorize

the State of Michigan to ignore and refuse to litigate the alleged violations of Plaintiffs' Federal Constitutional Rights to Due Process of Law and Equal Protection of the Law?

If we fought the Revolution to rid ourselves of a sovereign, how did sovereign immunity get into our common law?

As stated by Mr. Weller, at page 220:

The law also ascribes to the king, in his political capacity, absolute perfection. The king can do no wrong; which ancient and fundamental maxim is not to be understood, as if everything transacted by the government was of course just and lawful, but means ... the perrogative of the crown extends not to do any injury; it is created for the benefit of the people, and therefore cannot be exerted to their prejudice.

The king, moreover is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing; in him is no folly or weakness. And, therefore, if the crown should be induced to grant any franchise or privilege to a subject contrary to reason, or in any wise prejudicial to the commonwealth, or a private person, the law will not suppose the king

to have meant either an unwise or an injurious action, but declares that the king was deceived in his grant; and thereupon such grant is rendered void...

As further stated by Mr. Weller at page 221:

According to Blackstone, the rationale of sovereign immunity was simple:

[No] suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power... but who... shall command the king?... [T]he person of the king is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary; for no jurisdiction upon earth has power to try him in a criminal way; much less to condemn him to punishment.

In 1939, the State of Michigan allegedly waived its sovereign, common law immunity, by passing the Court of Claims Act. The Michigan Supreme Court has stated that the Court of Claims is a legislative court, intended to be the mechanism for citizens who claimed to have been wronged by the sovereign to have their claims heard. Taylor, 360 Mich at 150, 103 NW 2d at 770-71.

Further, it was stated in Ross v

Consumers Power Company, 420 Mich 567, 363 NW 2d 641 (1984):

By creating (the Court of Claims) with jurisdiction over the State, the legislature destroyed the theoretical basis for sovereign immunity.

This Court, by its Ruling in regard to removing Plaintiffs' Federal Constitutional Rights Violations from consideration, has, in effect, returned them to the original early English "King Can Do No Wrong Theory" cited above. What the court is telling Plaintiffs is that they just plain have no remedy for their alleged Federal Constitutional Rights Violations because of the Eleventh Amendment, precluding Plaintiffs from obtaining relief against the State of Michigan for violation of their Federal Constitutional Rights. This of course is intolerable as early on in the history of American Jurisprudence it was held in Marbury v Madison, 505 (1 Cranch) 137 (1803) that the law will generally provide a remedy for rights violated by the Government ("Governmental Accountability"). As was further held in Osborn v Bank of United States, 22 US (9 Wheat) 264, 391-92 (1821) the judicial power of the United States over claims arising under federal law is as broad witnin its sphere as is the legislative power of the United States ('full judicial power").

This Honorable Court merely tells Plaintiff -TOUGH LUCK, the Eleventh Amendment precludes your federal Claims, even though their rights have been violated. Of course, this answer is too simple, and it is clear that the Eleventh Amendment does not bar federal question jurisdiction at least over claims by citizens against their own states.

As further stated in Atascadero, 473 US at 295-96 (note 51) despite the wealth of scholarship on the history and meaning of the Amendment relatively little attention has been paid to the effect of the Amendment on the Supreme Court's Appellate Jurisdiction. As stated by Vicki C. Jackson in her excellent Law Review Article in 98 Yale Law Journal, Nov. 1988, at page 7:

This remedial hierachy, applied to cases originating in federal district courts, intersects with another important functional aspect of Eleventh Amendment Jurisdiction--the availability of federal review of state court judgments on those claims barred from Federal District courts. As to disfavored forms of relief then, the Eleventh Amendment functions less as an absolute jurisdictional bar, than as a form of abstentian, mandating that State Courts have the first opportunity to consider certain claims for relief arising under Federal Law.

The Supreme Court has routinely reviewed on the merits adverse Judgments by State Courts on claims for affirmative monetary relief made by individuals against States.

It is clear that pursuant to Cohens v Virginia, 19 US (6th Wheat) 264 (1821) the Eleventh Amendment does not preclude Supreme Court review of State Court Judgments whether in favor of or against the State as a formal party. Justice Marshall wrote in Cohens supra, concluding:

That the judicial power as originally given extends to all cases arising under the Constitution or Law of the United States, whoever may be the parties.

Marshall next considered whether that judicial power could be exercised in the Appellate form in cases to which a State was a party, and then concluded that even where the State was a party the Court could exercise appellate rather than original jurisdiction to review federal questions. See Cohens supra, at 393-405.

As stated by Vicki Jackson, at page 25 of her Article, supra:

For the purpose of reviewing State Court Judgments and Actions against States, Federal question jurisdiction is essentially unencumbered by the Eleventh Amendment.

As further stated by Vicki Jackson, at page 44:

The persistent exercise by the Supreme Court of Appellate jurisdiction over State Court cases regardless of whether the State itself is a named party Defendant, or the form of relief sought is best explained by the proposition that the Eleventh Amendment does not restrict the judicial power over cases arising under Federal law.

As stated by Vicki Jackson, at page 79:

The doctrinal basis of the common law doctrine of sovereign immunity have no application whatsoever to the Constitutional relationship of the States to Federal Courts, especially on federal claims.

Justice Marshall wrote in Marbury surpa that:

The first premise of the Courts was that for a violation of the right even by the Government the laws should provide a remedy -- a principle in opposition to that which insists on the absence of judicial remedy for Government wrongs.

It is clear that State law remedies for Governmental wrongdoing may

not appropriately give effect to those Federal interests, and therefore Federal Courts must be free to decide what remedies should be provided to redress violations of Federal right.

The Fifth Amendment violations illustrate this point. The Court has recently held that the just compensation requirement of that clause is a "self-executing" command to provide for the payment of compensation for a governmental taking. First Evangelical Lutheran Church v County of Los Angeles, 107 Ct. 2378 2383-89 (1987). Does the State's sovereign immunity from suit in Federal Court foreclose those Courts from requiring states to provide compensation if a State fails to provide adequate opportunity for the adjudication of those claims? Where the Constitution provides a self-executing command to a State to make payment where no other effective forum exists where the claim can be presented, it is fundamentally inconsistent with a predicate of a Constitutional system to invoke non-constitutional tradition of sovereign immunity to defeat the claim. Indeed the very clarity of this textual provision for a monetary remedy is inconsistent with the premise of sovereign immunity as a Constitutional Doctrine, at least

as a doctrine separate and apart from whatever constraints on jurisdiction Congress may impose on the Federal Courts. The Court has held that with respect to takings under Color of State Law, no Constitutional deprivation occurs by the mere fact of a taking, so long as the State has provided a mechanism to award the Constitutionally requisite just compensation. Williamson County Regional Planning Commission v Hamilton Bank, 473 US 172, 194-97 (1985). In District of Columbia Court of Appeals v Feldman, 460 US 462 (1990) it was stated:

But if a State did not provide an adequate mechanism for resolution of those claims, there is, in my view, no Constitutional or jurisdictional barrier to a Federal District Court entertaining such a claim for relief.

See also Pennzoil Company v Texaco, 107 S. Ct 1519, 1528 (1987) which held that where Plaintiff demonstrates that the State's remedial mechanism is inadequate, the Federal Common Law Doctrine ought not bar access to the only federal forum reasonably certain to be available.

As succinctly stated by Vicki Jackson in her Yale Article, supra at page 125:

First, articulated as a Constitutional

Doctrine grounded in Article III and the Eleventh Amendment, the Doctrine of State Soevereign Immunity to relief on Federal claims is so inconsistent with the establishment of judicial power over all Federal questions cases arising under a Constitution explicitly limiting State power that it lacks credibility as a reasoned exegesis. Something else is in fact going on and a failure to recognize and give voice to this something has detracted from the Court's ability to serve as a principled expositor of the Constitution.

Second, it is difficult to reconcile a Constitutional Doctrine of States' sovereign immunity with Congress' power to abrogate that immunity.

She then concludes in her Article, at page 126:

Marbury v Madison proclaimed that the essence of civil liberty of a government of law and not of men was the availability of a judicial remedy for governmental wrongdoing that invaded prviate legal rights *** It cannot be so justified today especially as applied to the States in their relations to the demands of Federal law. *** Recognizing the federal common law background for this set of doctrines is inconsistent with our basic constitutional structure and the role of the federal courts

therein. And it will permit the gradual evolution of a fore focused and candid development of the law of remedies for Governmental wrongdoing in the continued struggle to control and maintain a form of Government that can both "control the governed...and...control itself".

The Federalist No. 51 at 322 (J. Madison)

Vicki Jackson has been equally supported by Thomas J. Perrino of the Suffolk University Law Review. Mr. Perrino, in his article entitled "The Eleventh Amendment: State Unaccountability for Section 1983 Violations" which appears in Vol. 22, Winter, 1988, Suffolk University Law Review No. 4, succinctly states the problem, at page 1029, when he says:

The eleventh amendment's shield of immunity prohibits private citizens from suing states for damages incurred as a result of unconstitutional state activity.

He then states at page 1031:

This Note contends that sufficient evidence exists for the court to determine congressional intent to hold states accountable for Section 1983 violations and concludes that the court should reexamine current doctrine because present standards

frustrate Congress' intended purposes of Section 1983.

After going over the same ground as Vicki Jackson of the Yale Law Journal, he concludes as follows:

Congressional enactment of the Dictionary Act provides further evidence that the forty-second Congress intended to include states within the meaning of the term 'person'. The Court, however, relies upon Edelman v Jordan's interpretation that 'person' necessarily excludes states because of section 1983's exclusion of municipalities, Monell v Department of Social Services severely undercut that rationale, holding municipalities liable as persons under section 1983. A logical extension of Monnell's reasoning compels the finding that states are subject to section 1983.

The Supreme Court's continued refusal to hold states accountable for violations of the fourteenth amendment renders section 1983 almost meaningless with regard to state transgressions. This result denies reimbursement to persons wrongly deprived of established property rights, such as social security benefits, Medicaid funds, and ADC assistance. The Court effectively provides states with at least one free constitutional violation. The Court should recognize

that the current doctrine, rather than enhancing federalism and preserving the federal-state balance, tips that balance sharply in favor of the states at the expenses of citizen's civil rights.

The Supreme Court's objective, clear language requirement attempts to balance eleventh amendment immunity against the remedial nature of Section 1983. Holding that the eleventh amendment bars citizen suits, the Court rejects the plain words of the amendment. Such an interpretation hinders plaintiffs seeking redress for unconstitutional state behavior. The fourteenth amendment, because aimed at state action, necessarily limits state eleventh amendment immunity. By acting to enforce the fourteenth amendment, Congress may provide citizens a cause of action against states in federal court. Based upon the history and purpose of section 1983, the Court should determine that section 1983 abrogates the immunity of the eleventh amendment. The rationale for municipal liability logically leads to state liability, thereby ensuring state adherence to the Constitution.

This tribunal cannot skate around the serious issues and questions presented by Plaintiffs' alleged Federal Constitutional violation claims, and must necessarily reverse the Lower

> Court Decision Granting Summary Judgment; at least sending this back to that Court and that Tribunal for, at a minimum, a trial of the issues involved. Without a forum to present their valid claims, obviously the State of Michigan Court system opens itself up to quick reversal by the United States Supreme Court.

H. & I. FEDERAL QUESTIONS RAISED IN COURT OF ORIGINAL JURISDICTION AND ON APPEAL.

This paragraph is complied with in paragraph G. above.

J. CONCISE ARGUMENT AMPLIFYING REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

Recent legal opinions denote a trend to extinguish citizens' rights established by the Bill of Rights. The Fifth Amendment and the Fourteenth Amendment clearly provide to Plaintiffs the guaranteed protection of Due Process of Law and Equal Protection of the Law, and Defendants have successfully precluded them justice by relying on archaic law, to the effect that a State is not a Person under 42 USC 1983.

This, of course is a ridiculous conclusion, and in direct opposition to what our founding fathers stated in our Constitutional documents. We fought a Revolution to rid ourselves of a sovereign and sovereign immunity, and Judge Kallman's holding that the State is not a person, reinstate that outdated doctrine. It is clear that the Eleventh Amendment does not bar Federal question jurisdiction, and the State of Michigan has clearly not provided an adequate mechanism for the resolution of their claims alleging violation of Federal Constitutional Rights.

If the Eleventh Amendment and interpretation of 42 USC 1983 precludes litigation against a state for its violation of Federal Constitutional Rights, then we have no Constitutional Rights against a state, and the Fourteenth Amendment is meaningless.

K. APPENDIX.

1. Order of Judge Kallman in

the Court of Claims.

ORDER

At a session of said Court held in the Ingham County Circuit Court in the City of Lansing, Ingham County, Michigan, on the 17th day of August, 1989.

Present: Hon. James T. Kallman, Circuit Court Judge

Defendants' Motions for Summary Disposition, having been considered by the Court, and the Court having reviewed all of the pleadings in this matter,

IT IS HEREBY ORDERED:

1. Plaintiffs' claims against Defendants are dismissed because Defendants are protected by governmental immunity while engaged in governmental functions, pursuant to MCLA 691.1401 et seq.

2. Plaintiffs' federal constitutional claims (Counts III and IV) are dismissed because Defendants are not "persons" as that term is used in 42 USC 1983 (see Smith v Dept. of Public Health, 428 Mich 540; 410 NW2d 749 (1987).

3. Plaintiffs claims against Defendants are dismissed because they are barred by the applicable

statute of limitations, MCL 600.5805; MSA 27A.5805, Plaintiffs' Complaint having alleged tortious actiivty between May, 1980 and February, 1986, but not having been filed until April, 1989, in excess of the three year statute of limitations.

4. This Order adopts the reasoning and analysis set forth in the Court's Opinion and Order in Abshire et al v State of Michigan et al, Court of Claims No. 87-11529-CM.

/s/James T. Kallman, Circuit Judge

2. Order of Court of Appeals.

ORDER
Robert J. Danhof, C.J., Presiding Judge

John H. Shepherd
Martin M. Doctoroff
Judges

Docket No. 120240
LC# 89-012237 CM

The Court orders that the motion to affirm pursuant to MCR 7.211(C)(3), is GRANTED for the reason that the questions sought to be reviewed are so unsubstantial as to need no argument or formal submission.

/s/ Robert J. Danhof
December 5, 1989

3. Order of Supreme Court.
ORDER
Michigan Supreme Court
Lansing, MI
Entered: September 19, 1990
SC 88072
COA 120240
LC 89-12237-CM

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

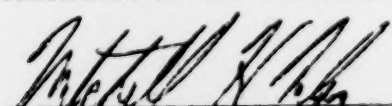
Levin, Boyle and Archer, JJ., would remand the case to the Court of Appeals for plenary consideration.

/s/ Corbin R. Davis, Clerk
Dated: September 19, 1990

Dated: January 15, 1991

Respectfully submitted,

HERITAGE LAW CENTER, P.C.



Mitchell H. Nelson (P22825)
Attorney for Petitioners
731 Front, NW
Grand Rapids, MI 49504
(616) 774-0055